IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 84,156

FERGUSON TRANSPORTATION, INC.,
f/k/a MURRAY VAN & STORAGE, INC.,

Petitioner,

vs.

NORTH AMERICAN VAN LINES,
INC., etc.,

Respondent.
_____/

PETITIONER'S AMENDED BRIEF ON THE MERITS

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
P. O. Drawer 3626
West Palm Beach, FL 33402
and
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STATEMENT OF THE CASE

Ferguson Transportation, a Florida moving and storage company, had an exclusive agency agreement allowing it to act as the exclusive agent of NAVL, a nationwide interstate carrier of household goods, in Broward County.[1] NAVL breached that agreement by appointing Advance Relocation, another Florida moving and storage company, to act as its agent in Broward County also. After refusing to terminate Advance Relocation, over the next four years NAVL joined with Advance Relocation to induce Broward County customers to book interstate moves with Advance Relocation, all to Ferguson Transportation's detriment. NAVL's breach of contract and NAVL and Advance Relocation's tortious interference destroyed Ferguson Transportation's business.

Ferguson Transportation sued NAVL and other Defendants (Advance Relocation, Molloy and Grochowski), who are not involved in this appeal. Ferguson Transportation's first claim against NAVL was for breach of its exclusive agency agreement to represent NAVL in Broward County. Its second claim was against NAVL, Advance Relocation, Molloy and Grochowski for tortious interference with its advantageous business relationships with its existing and prospective Broward County customers (R1752-56).

The jury subsequently returned a verdict finding that NAVL had breached its agency agreement with Ferguson Transportation; and that NAVL, Advance Relocation,

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[1]/The definition of "household goods" for purposes of interstate commerce goes far beyond its ordinary meaning and includes office furniture, high value products, etc. 49 U.S.C. 10102.

Molloy and Grochowski had tortiously interfered with Ferguson Transportation's advantageous business relationships with its established and prospective customers in Broward County. The jury awarded Ferguson Transportation 1.3 million dollars in compensatory damages on each count, and the jury assessed 13 million dollars in punitive damages against NAVL, $500,000 against Advance Relocation, $100,000 against Molloy and $100,000 against Grochowski (R3225-27).

The jury had been allowed to award compensatory damages on each of Ferguson Transportation's claims. However, in order to prevent a duplicative award against NAVL, the parties had stipulated prior to jury deliberations that only one of the compensatory damage awards would be entered against NAVL (R1419-21,3228-29). Accordingly, Final Judgment was entered pursuant to the parties' stipulation.

In denying Defendants' post-trial motions, the court stated (R3549-50):

> The Defendants' motions for remittitur are each denied. The Defendants have sought a remittitur of both compensatory and punitive damages. The Court has reviewed the jury's award pursuant to applicable case law and Florida Statute §768.74. Regarding damages, both punitive and compensatory, the Court finds as follows: The amounts awarded were not indicative of prejudice, passion or corruption on the part of the trier of fact. The case was presented in a very professional and straightforward manner by all parties. The transcript is an accurate reflection of the proceedings in the court and the atmosphere of the trial was not such as to arouse the prejudice or passions of the jury and there is no basis or claim of any sort ["of"] corruption on the part of the jury.
>
> It does not appear that the facts were ignored by the jury in reaching their verdict or that they misconceived the

> merits of the case relating to the amounts of damages recoverable. The verdict is in line with the Plaintiff's presentation of the case and the jury had the discretion to accept the Plaintiff's version.
>
> The jury was properly instructed on the elements of damages and the Court is not aware of any basis for concluding that the damages awarded were due to taking improper elements into account or due to speculation and conjecture. The punitive damage awards when viewed in a light favorable to the Plaintiff appear to be based on an assessment of the net worth of the parties and on the underlying facts of the case. The punitive damages awarded do not bear a reasonable relationship to the amount of compensatory damages proven and the injury actually suffered by the Defendant, but that is not their purpose. Their purpose is retribution and deterrence. E.g., PACIFIC MUTUAL LIFE INSURANCE CO. v. HASLIP, 111 S.Ct. 1032 (1991) at 1044. The punitive damages awarded could be adduced in a logical manner by reasonable persons.
>
> The fact that the punitive damage award against North American Van Lines, Inc. is precisely ten times the compensatory damage award has been considered by the Court. But there is logic and justification in the record for the award and the award falls within the wide latitude allowed the jury in awarding punitive damages. The award does not violate the Due Process rights of the Defendants.

NAVL appealed. Advance Relocation, Molloy and Grochowski joined in filing a separate appeal. The Fourth District entered a per curiam affirmance of both the compensatory and punitive damage awards against Advance Relocation, Molloy and Grochowski for tortious interference with advantageous business relationships.

In NAVL's appeal, the court affirmed the 1.3 million dollar compensatory damage award against NAVL, but it reversed the punitive damage award, finding that Ferguson

Transportation had failed to prove the first element of the tort of tortious interference, i.e., "the existence of a business relationship under which the plaintiff has legal rights" A5).[2] The Fourth District acknowledged that Ferguson Transportation had an exclusive agency agreement which allowed it, and only it, to deal as NAVL's representative with all prospective Broward County customers. However, the Fourth District concluded that Ferguson Transportation's exclusive contract gave it no protectable interest against tortious interference with prospective NAVL customers in Broward County. Rather, the court ruled that in order for Ferguson Transportation to be able to sue for tortious interference with prospective NAVL customers, it had to prove that it had an ongoing business relationship (A7) with identifiable customers (A5) who were wrongfully induced to book their interstate moves with Advance Relocation.[3]

The Fourth District concluded that Ferguson Transportation had presented no evidence to allow the jury to conclude that but for NAVL and Advance Relocation's tortious interference, the NAVL customers who moved with Advance Relocation would have moved with Ferguson Transportation.[4] Accordingly, the court ruled that (A7):

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[2]/NAVL challenged the compensatory and punitive awards on numerous grounds. The Fourth District rejected all of NAVL's contentions except for this one.

[3]/The court relied solely upon a Second District opinion, SOUTHERN ALLIANCE CORP. v. WINTER HAVEN, 505 So.2d 489 (Fla. 2d DCA 1987), which did not concern an exclusive agency agreement, and therefore was totally distinguishable.

[4]/As demonstrated, infra, that finding ignored the evidence and in effect substituted the Fourth District's finding in that regard for an obvious contrary jury finding.

> The trial court should have granted a directed verdict for North American on the tortious interference claim as there was no competent, substantial evidence that appellant interfered with any ongoing business relationship. The punitive damages were awarded on the basis of the tortious conduct and are therefore reversed. (Emphasis added).[5]

The Fourth District subsequently granted Ferguson Transportation's Motion for Certification and certified the following question to this Court as one of great public importance (A1-2):

> **WHETHER, UNDER FLORIDA LAW, A PLAINTIFF WHO HAS AN EXCLUSIVE CONTRACT WITHIN A GEOGRAPHICAL TERRITORY, IS AFFORDED A BUSINESS RELATIONSHIP WITH ALL PROSPECTIVE CUSTOMERS WITHIN THAT TERRITORY, WHICH IS PROTECTABLE AGAINST TORTIOUS INTERFERENCE, OR MUST THE PLAINTIFF PROVE A BUSINESS RELATIONSHIP WITH IDENTIFIABLE CUSTOMERS?**

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[5]/The Fourth District's affirmance of tortious interference as to Advance and reversal of tortious interference as to NAVL is inconsistent. If there was no proof of a business relationship under which Ferguson Transportation had legal rights, that would be true in regard to the claim of tortious interference against Advance Relocation as well. The reversal of tortious interference as to NAVL is also inconsistent because of the affirmance of the compensatory damages awards, which were based on proof of the loss of specific customers from which profit would have been generated but for NAVL and Advance Relocation's actions.

STATEMENT OF THE FACTS

NAVL Breached Murray Van's (Ferguson Transportation's Predecessor) Exclusive Agency Agreement in 1974 by Appointing Another Agent In Its Exclusive Broward County Territory

Joe Ferguson was the minority shareholder in, and vice president and general manager of, Murray Van & Storage, Inc., a moving company, when it was formed in 1963 in Broward County (R88,392). Over the years it operated as an exclusive agent for different interstate carriers at different times. Murray Van moved up to a larger carrier each time its business outgrew the carrier it was representing (R92,96-97). In 1968, Murray Van was the third or fourth largest booking agent for American Red Ball in the entire nation (R89,92,97). When Red Ball could no longer accommodate Murray Van's volume of business, Ferguson began talking to the largest carriers in the country about becoming their agent (R97). Because of the market Murray Van had captured, it was able to, and did, insist upon an exclusive agency agreement (R97,101).

NAVL did not give exclusive agency contracts. However, it was so anxious to obtain Murray Van's established business that in 1970 NAVL agreed to make Murray Van its exclusive Broward County agent (R101-02). NAVL clearly understood that it was to appoint no other agent to solicit and advertise for business in Broward County (R102-03). The exclusivity provision was placed in an Addendum to NAVL's agency agreement with Murray Van. Ferguson was very excited about becoming an NAVL agent, and was determined to make Murray Van NAVL's best agent (R105). By 1972,

Ferguson had booked a million dollars in business that year, and earned the "quality agent" award, which less than 10% of NAVL's 850 agents ever receive (R105-6).

NAVL, in the meanwhile, had set about to become the largest household goods carrier in the nation (R107). To do so, it was trying to attract the big agents away from other carriers around the country (R108). NAVL approached a New York moving company, one of the largest Allied agents in the nation, and asked it to become an NAVL agent (R108). In order to entice it away from Allied, NAVL offered to sell the New York company a Miami moving company it owned (R108). This would allow it to "backhaul", i.e., schedule shipments going north for the moving vans it sent to Florida (R108), which would be very lucrative (R108,2604).

The New York company wanted to solicit and advertise in not only Dade County, but Broward and Palm Beach counties also (R108,114). NAVL knew that agreeing to this in Broward County would be a breach of its exclusive agreement with Murray Van. NAVL agreed, however, in order to attract the New York company away from Allied (R109). Accordingly, in late 1972, NAVL entered into agency agreements with the New York company and their other entities, behind Ferguson's back, allowing them to go into Broward County to advertise and solicit Murray Van's business (R114-15).

In 1973, Ferguson and his partner, Murray, learned that NAVL had intentionally violated their exclusive agency agreement (R107). NAVL offered to pay Murray Van a mere $77,000 for any damages that might result (R110). Ferguson strongly objected, but Murray, the majority shareholder, wanted to accept the money (R110). Ultimately,

the parties entered into agreements in 1974 in which NAVL admitted that it had breached Murray Van's exclusive agency agreement, and paid $77,000 for having done so (R116,PX52i), extending Murray Van's agency contract for 10 more years, and providing that the New York company could solicit business and advertise in Broward County as NAVL's agent, but that it could not maintain an office there (R114-15,PX52h). The Agreement specified that the exception to Murray Van's exclusive rights was limited to the New York company alone[6] (R116,PX52h).

Despite this exception carved out of Murray Van's exclusive agency contract, over the next 10 years Murray Van continued to grow, and captured 25% to 35% of the market (R118). Out of 850 agents, Murray Van was ranked as NAVL's fourth to sixth highest revenue producing agent in the nation (R118) . Ferguson received an NAVL award that only 28 of its 850 agents had ever received (R116). Ferguson had two books of awards, commendations, and testimonials regarding his excellence in the moving industry (R227,PX90-91). He received the Broward County Chamber of Commerce business person of the year award (R228-30). In numerous ways, Ferguson expended time and money to generate goodwill for NAVL in Broward County (R231-32).

When Murray died in 1976 (R392), Ferguson became the majority stockholder (R394), and in 1984 he became the sole shareholder (R417,434). As the renewal of contracts approached in the early eighties, Ferguson was about to build a million-dollar

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[6]/James Molloy, one of the Defendants in this case, was not included in the New York company exception. Neither were Defendants Grochowski or Advance Relocation.

facility in Orlando (R119), double the size of his Boca Raton facility with a half-million-dollar expansion (R119), and build a 158,000 square feet building in Deerfield Beach in order to consolidate six of his South Florida facilities (R120,428). Before he made these financial commitments, however, Ferguson wanted the assurance that he would continue to have his exclusive Broward County territory (R120,402-03,434). Accordingly, when he renegotiated Murray Van's agency agreement in 1983, he insisted that the Addendum specifically identify those entities that could act as an NAVL agent in Broward County (R120,129,404,467,PX52b). They were essentially the entities owned by the New York company (R116,PX52b).[7] The Addendum provided that except for the entities specifically listed, Murray Van was still NAVL's exclusive agent in Broward County, giving it the exclusive right to use NAVL's "marks", i.e. its name, logo and "colors" to advertise and solicit business for NAVL in Broward County (R129). The Addendum also provided that this exception (R116,PX52b, Addendum p.2):

> ...shall not be construed to grant Company [NAVL] the right to appoint any other individual, partnership, corporation or other business or organization as an agent for company [NAVL] in Broward County, Florida.

Relying upon the fact that he was guaranteed ten more years as NAVL's exclusive agent in Broward County, except for the New York company and its related entities with which Ferguson had been able to live, in 1984 he purchased 12.5 acres in Deerfield

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[7]/James Molloy, Grochowski, and Advance Relocation, co-Defendants in this case, were not included in the exception.

Beach and proceeded with plans for a 158,000 square-foot building (R429). He began construction in January 1985 (R431). The name of the company was changed in 1985 from Murray Van to Ferguson Transportation (R398,400).

NAVL Again Breached Ferguson Transportation's Exclusive Agency Contract In 1986 By Appointing Advance Relocation to Act As its Agent in Palm Beach County, With the Understanding He Could Invade Ferguson Transportation's Exclusive Broward County Territory, After Being Put on Notice That This Competition Would Destroy Ferguson Transportation

James Molloy and Bill Grochowski had owned and operated Advance Relocation as NAVL agents in New York since 1979 (R666). In 1985, they purchased a moving and storage company in West Palm Beach, known as Wilkinson Moving & Storage ("Wilkinson").[8] They also formed Advance Relocation of Florida doing business as Wilkinson. Both Advance Relocation and Wilkinson were only local (statewide) movers. They could not handle moves in interstate commerce without operating as the agent of an authorized interstate commerce carrier.

In early 1985, James Molloy approached NAVL about becoming an NAVL agent in Palm Beach County in order to be able to backhaul to New York so their trucks would not go back empty (R140,472,664-66). This, of course, would mean more money for NAVL. Jack McTeague, NAVL's vice president for the southern states, told Molloy "no", despite the fact that he was one of NAVL's favorite agents in the Northeast because

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[8]/Wilkinson did not come within the exception to Ferguson's contract. It had never been an NAVL agent (R695).

he was a good producer in New York (R2435). McTeague opposed allowing Molloy to become NAVL's Palm Beach agent because he did not like northeast agents and did not want one in Florida (R2567-68,2603). McTeague knew that northeast agents, including Molloy, solicited and operated outside their geographical territory (R2571). Over the years, NAVL had allowed its northeast agents to invade each other's territories (R2606). This was not only very common, but rivalries between its agents were actually encouraged by NAVL (R2607-08). As NAVL's own expert testified, pitting one agent against another increased each agent's productivity (R823-24), and necessarily NAVL's profitability.

McTeague, head of NAVL in the southern states, did not allow NAVL's agents to invade each other's territories. He was concerned for Ferguson because he knew that if James Molloy, who was extremely aggressive, became an NAVL agent in Palm Beach County, he would violate Ferguson's exclusive territory by soliciting business in Broward County (R144,2570-72,2579,2582-83). For that reason, McTeague felt that the appointment of Molloy as NAVL's agent in Palm Beach County was a violation of Ferguson's contract (R2574-75). A McTeague interoffice memo forewarned that if Molloy opened in West Palm Beach "we [NAVL] will have a major problem" (PX77).

When McTeague turned Molloy and Grochowski down, they went to his boss, Dennis Koziol, NAVL's vice president of sales and marketing, who also said "no" (R140), and on to his boss, Michael Kranisky, NAVL's executive vice president, who

likewise said "no" (R140). They finally approached Kenneth Maxfield, NAVL's president and CEO, who told them that he would see what he could do (R671).

On April 15, 1985, McTeague called Ferguson to alert him to what was going on, and suggested that he contact Maxfield (R141). Ferguson sent Maxfield a telegram that night emphasizing that he was making a 10 million dollar investment in south Florida,[9] and in light of his financial commitments, he could not withstand yet another competitor (R141-43,475-76,PX53), along with those NAVL had previously wrongfully allowed to compete with him. McTeague subsequently advised Ferguson that Maxfield had told Molloy and Grochowski "no" (R141-43,PX53).

Thereafter, Maxfield secretly met with Molloy and Grochowski and approved them as NAVL's West Palm Beach agent, despite the warnings and protests of NAVL's other executives and its law department. They discussed Ferguson's exclusive agency in Broward County (R2691-92). Molloy claimed Maxfield led him to believe that he would not be restricted to Palm Beach County regardless of his contract language (R737,PX72). He claimed Maxfield said that the only prohibition was against having another NAVL agent with an office in Broward County (R677). In other words, consistent with NAVL's management philosophy in the northeast, which allowed and encouraged agents to invade each other's territory, Molloy claimed Maxfield led him to believe that he could invade Ferguson's exclusive territory. Maxfield did so because he negotiated a much cheaper

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[9]/Ferguson was in the middle of the construction of the Deerfield Beach building (R433).

contract with Molloy than NAVL had with Ferguson Transportation, which was being paid an incentive bonus that was seven or more times what NAVL agreed to pay Molloy (R135-37). Therefore, NAVL derived an economic benefit from any business Molloy took from Ferguson Transportation (R135-38). As McTeague stated: "It was all a 'matter of profitability'" with NAVL (R2608).

NAVL concealed its secret agreement with Molloy and Grochowski from Ferguson, as evidenced by Koziol's October 29, 1985 interoffice memo asking how to handle the situation, since Ferguson had been told Molloy would not be allowed an agency in West Palm Beach (PX76). Months passed without Ferguson being told about the secret agreement. Finally, in late October/November, 1985, Joe Ruffolo, an NAVL vice president, told Ferguson that he better get involved quickly (R162,559). Ferguson traveled to NAVL's headquarters in Fort Wayne, Indiana to plead with Maxfield not to make Molloy and Grochowski an NAVL agent in Palm Beach County (R2410). He was greatly concerned that they would invade his territory because of their history as northeast agents. His company could not withstand an onslaught from any more competitors in Broward County. Ferguson Transportation had just moved into its new Deerfield facilities (R433-34), and had incurred extraordinary expenses as a result of consolidating its south Florida operations under one roof (R517). Ferguson Transportation, and Ferguson himself, were "on the hook" for a 5-million-dollar loan (R431-32,434-35). Because of these major financial commitments (R434), and the fact that Ferguson had relied upon an exclusive territory for another 10 years in making those commitments

(R434,475-76), and the fact that the South Florida market was one of the most competitive in the country (R451-52), Ferguson told Maxfield that his company would be destroyed if Molloy solicited his business in Broward County (R2975,2579). Maxfield personally assured Ferguson that he would not let Molloy violate Ferguson Transportation's exclusive agency contract (R164).

The ten-year agency agreement entered into by Molloy and Grochowski for Advance Relocation doing business as Wilkinson Transfer to operate as NAVL's agent in Palm Beach County was executed on January 1, 1986 (R684,DX3). While the contract contained no express territorial restriction, its standard language required compliance with the agency manual, which limited an agent's territory to the county in which it was domiciled, i.e., Palm Beach County (R80,766,PX75). Molloy and Grochowski were informed of Ferguson's exclusive rights in Broward County before they signed the contract (R2380-81,2384-84,2603,2542-43). They were, therefore, aware that pursuant to their contract they were not supposed to advertise or solicit business from Broward County. However, as previously stated, Molloy claimed Maxfield had led him to believe that he could invade Ferguson's exclusive territory, the way he invaded other agents' territory in the northeast. Maxfield was obviously trying to have the best of both worlds, i.e., fierce competition between two agents in the same market in order to generate even more money for NAVL, regardless of who handled the business. And, the more business Molloy stole from Ferguson, the better it was for NAVL because it was paying Advance Relocation less than it was paying Ferguson Transportation.

Regardless of what Maxfield told Molloy he could or could not do in Broward County, McTeague testified that he had advised Molloy that he could not advertise in Broward County and that Molloy had agreed (PX78,79). Molloy denied this (R734).

NAVL's Agency Arrangement with Advance Relocation

Advance Relocation was not an authorized interstate commerce carrier. In order to book interstate moves from Broward County, it had to have NAVL's authority, approval and assistance. NAVL had to agree to the moves in advance because they had to be performed under NAVL's ICC bills of lading and under NAVL's ICC identification number (R206-08). Advance Relocation was required to call NAVL's Ft. Wayne, Indiana dispatcher to book and register all interstate moves with NAVL, including those moves identified to NAVL as originating from Broward County, since NAVL was required to coordinate all interstate moves under its ICC authority (R206-08). NAVL provided all the documentation, such as NAVL's sales brochure, the bills of lading, etc., that were used by Advance Relocation for each of the interstate moves (R206-08), all of which were used to deceptively represent Advance Relocation as NAVL's authorized Broward County agent. Not only did NAVL authorize and prearrange Advance Relocation's interstate moves from Broward County, it also participated in the monies paid for each move. Advance Relocation would collect those monies, that were payable to NAVL, from the customers (PX62-64), remit the monies to NAVL, which would keep a portion for itself, and remit a portion back to Advance Relocation (R371,486,488-89).

Three Years Nine Months of Tortious Interference with Ferguson Transportation's Business Relationships With Prospective Customers in its Exclusive Territory

A) Advance Relocation's Advertising and Soliciting in Broward County

1986

Advance Relocation immediately began to advertise as NAVL's Broward County agent. A month after Advance Relocation began operation in Florida, the new Broward County yellow pages came out in February 1986 (R497). It contained a full-page advertisement for Advance Relocation/Wilkinson as NAVL's agent, and listed a local Broward County telephone number[10] leading Broward County residents to believe Advance Relocation was domiciled in Broward County (R165,497,PX54). The advertisement showed an NAVL moving van with its recognizable logo and colors, listed NAVL's ICC number and stated that Advance Relocation had been serving the Broward area for over 50 years, when it had been doing so only for a few months (R172,PX54).[11]

When the advertisements came to Ferguson's attention in April 1986, he called McTeague and Kranisky and told them that Molloy had done exactly as he predicted (R166,1279). When NAVL did nothing, finally in June, 1986, Ferguson wrote Maxfield to advise him that Molloy had done exactly what Maxfield had assured him he would not

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[10]/Yellow page advertisements must be placed anywhere from 4 to 6 months in advance of printing (R165).

[11]/NAVL officials admitted the advertisement was misleading (R2575,2581).

do (R168,PX83). Ferguson asked what Maxfield intended to do to correct the situation, which would have a severe negative impact on Ferguson Transportation (R369,527).

Maxfield and McTeague claimed that Molloy had orally agreed not to advertise in Broward County (PX57,78-79). Molloy emphatically denied being told that he could not advertise nor solicit in Broward County and denied ever agreeing not to do so (PX72,R720,732,734-35,738,742,2713-14). In fact, he claimed Maxfield had led him to believe he would be allowed to do so. Molloy testified that if he had known his contract would be enforced in that manner, he would never have entered into his agency agreement (R1685-86,2677). Molloy felt he had been misled and "tricked" by NAVL (R2699-2700), which obviously had told him one thing and had told Ferguson another.

Maxfield initially advised Ferguson that he would get the calls placed to Advance Relocation's Broward County telephone number transferred to Ferguson Transportation (R170,PX56). Instead of doing that, however, Maxfield merely asked Molloy to disconnect the telephone temporarily until he could get Ferguson calmed down (R2699-2700). McTeague felt NAVL should insist that Advance Relocation's Broward County telephone number be permanently terminated (PX79). Maxfield subsequently advised Ferguson that Advance Relocation's telephone number was being removed from service on July 18, 1986 (R174,PX57). Maxfield promised Ferguson that NAVL would continue to monitor the telephone number to see that it was not returned to service (PX57). In fact, NAVL only monitored it for a few days (R2578). Maxfield also informed

Ferguson that NAVL's management unanimously agreed that if Molloy began using the telephone number again, NAVL would cease doing business with Advance (R519,PX57).

When Molloy disconnected the telephone on July 18, 1986, Ferguson was led by NAVL to believe that the problem had been corrected and that was the end of it (R182,193). In fact, behind Ferguson's back something very different was going on. Since NAVL did not want to lose Advance's business, it began negotiating a plan to allow Advance to re-enter the Broward County market (PX71). NAVL indicated to Molloy that it was "committed" to keeping the lines of communication open to Molloy's advertising in Broward County (PX68). NAVL even reimbursed Molloy $21,120, the cost of the yellow pages advertisement, as an indication of NAVL's support of Advance's future solicitation of business in Broward County (PX68). Ferguson had no idea that any of these ongoing discussions and negotiations were taking place (R182,192).

In addition to advertising, Advance Relocation immediately began soliciting Broward County business from Ferguson Transportation by representing to consumers that it was NAVL's Broward County agent. Advance Relocation's employees were told to "go after" the Broward County business (R263). They began to solicit in Broward County by handing out business cards, initiating a massive direct mail campaign, placing leaflets in mailboxes, and canvassing and calling potential movers by telephone (R262-63,521,592,655,2292-93,2296). They would call people whose homes were listed for sale in the newspaper and offer a no cost, no obligation estimate (R2292-93,2304-05). Two employees did telemarketing of the public at large (R654). Their salesmen and

estimators visited potential customers in Broward County (R655,659). Advance Relocation's 40-foot "traveling billboard" moving vans entered Broward County with NAVL's name, colors and logo painted on them (PX27). In all of their solicitations, Advance Relocation's employees represented themselves as NAVL's Broward County agent (R2269-72,2305). The solicitation continued for almost four years, from 1986 until Ferguson Transportation was forced out of business in 1989 (R263).

When Ferguson learned in early 1986 that Advance Relocation was directly soliciting his Broward County business representing itself to be NAVL's Broward County agent (R497-503,592, 2398), he immediately complained to NAVL and sent it a packet of documents Advance Relocation was using in its solicitations (R499,502-03,2398). NAVL not only failed to take any action to stop that interference, it continued to provide its essential support to enable the interference to continue under the authority of NAVL's ICC registration number. Advance Relocation continued to solicit business as NAVL's agent in Broward County throughout 1986 (R263,2698,2708). Ferguson repeatedly advised NAVL that these practices were continuing (R503,2402-03), demanded that it do something to stop them (R592), but NAVL never did anything (R2403,2523,2685-86).

Molloy admitted that the use of NAVL's name in soliciting and advertising provided a distinct advantage for Advance Relocation, an unknown in Florida, because NAVL had an established name in the moving industry for 25 to 30 years, which the public had come to trust (R2269-72). Additionally, use of NAVL's name allowed Advance Relocation to take advantage of the goodwill generated over a 16-year period

by Ferguson Transportation for NAVL in Broward County, and the $250,000 a year Ferguson Transportation was spending on advertising itself as NAVL's Broward County agent (R369,521). Customers who meant to call NAVL's established Broward County agent, Ferguson Transportation, would unknowingly call Advance Relocation instead (R521). Advance Relocation answered its telephone as "North American" so the customers never knew they had the wrong agent (R659). When the customers mentioned Ferguson Transportation's name to Advance Relocation, they were deceived into believing that was with whom they were dealing (R979-80).

Throughout 1986, even though NAVL was aware that Advance Relocation was improperly stealing Ferguson Transportation's business in Broward County, it nonetheless booked every move that Advance Relocation called into its dispatcher. NAVL was assuring Ferguson that it was trying to help him, and yet behind his back NAVL was participating in the very tortious interference it claimed it was trying to prevent. NAVL could have refused to itself participate in the tortious interference, and at the same time that would have prevented Advance Relocation's tortious interference. All NAVL had to do was instruct its dispatcher not to schedule any moves for Advance Relocation from Broward County. Instead, NAVL chose to directly participate in the stealing of Ferguson Transportation's business. It facilitated the tortious interference by scheduling the moves and authorizing them to be performed under its ICC registration number; by supplying Advance Relocation with NAVL's bills of lading for the moves, thereby deceptively representing to customers that Advance Relocation was NAVL's authorized Broward

County agent; by having the monies collected on the moves made payable to NAVL; by itself sharing in the monies derived from the moves, and then sending a portion of those monies which it knew belonged to Ferguson Transportation, as its exclusive Broward County agent, to Advance Relocation. It also participated in Advance Relocation's direct solicitation by providing NAVL's sales brochures to use in the solicitation.

1987 - 1988

In January 1987, Molloy reactivated Advance Relocation's Broward County telephone number, which had been inoperative for five months. Molloy also informed NAVL that he was going to renew his advertising in the Broward County yellow pages (PX80,R741). NAVL told Molloy not to do that (DX11), and it wrote a number of advertisers, telling them not to accept advertisements from Advance Relocation with NAVL's logo (R507). Those letters were not only a year too late, but they were half-hearted and two-faced. At the same time NAVL continued to readily book every Broward County shipment Advance Relocation stole from Ferguson Transportation. NAVL's active participation in the tortious interference by booking those shipments and authorizing them to be moved in interstate commerce under its ICC identification number, was essential to Advance Relocation's ability to continue its Broward County activities. The tortious interference could not have succeeded without NAVL's direct participation.

Ferguson did not learn that Advance Relocation's Broward County telephone number had been reactivated until May 1987, at which time he complained to NAVL.

By that time, Ferguson had also become aware of new violations of his exclusive agency agreement by Advance Relocation and sent copies to NAVL: the Broward County yellow page advertisement had been renewed; there were now listings in the Pompano and Deerfield telephone directory with a Ft. Lauderdale telephone number; and there were listings in the Boca Raton/Deerfield telephone directory with a local telephone number (PX58). Although these yellow page advertisements did not list Advance Relocation as an NAVL agent, they did list NAVL's ICC number and did state that Advance Relocation was an authorized interstate mover. Advance Relocation's authority to transport interstate shipments was solely as a result of being an NAVL agent because it was not an authorized ICC carrier. Accordingly, the advertisements still tortiously interfered with Ferguson Transportation's Broward County business. Also, for a portion of 1987, the Advance Relocation's 1986 advertisement, which had contained NAVL's name, logo and "colors", was still in existence.

In May 1987, Ferguson insisted that NAVL terminate Advance Relocation as an NAVL agent (PX58). NAVL did not do so. An NAVL interoffice memo acknowledged that it should at least insist that Advance Relocation's Broward County telephone number be terminated immediately to protect Ferguson Transportation's agency contract (PX88). NAVL obviously could have taken legal action to require this. Yet, it did nothing and the telephone number was never terminated thereafter (R236). This was despite Maxfield's promise to Ferguson that NAVL would terminate Molloy's agency agreement if he did not cease using the Broward County telephone number (R519,PX57). NAVL

executives admitted that Molloy's actions in advertising and soliciting in Broward County violated Ferguson Transportation's contract, that NAVL had an obligation to protect Ferguson Transportation's contract rights and that it had the right and obligation to terminate Advance Relocation's contract because of these violations (R2369-75,2406-07).

On June 23, 1987, Ferguson complained to Maxfield that he was still getting the "run-around", that NAVL had done nothing over the past year and a half to protect his agency agreement (PX59), and that NAVL had done nothing to halt Molloy's solicitations in Broward County in violation of Ferguson Transportation's exclusive contract (R2403). NAVL should have refused to book Advance's Broward County moves (R518) or terminated it as an agent (R519,593). Ferguson never heard one word in response. He never even got the courtesy of a return telephone call (R213). Finally, in August 1987, Ferguson was forced to sue NAVL, Molloy, Grochowski, and Advance, hoping that this would cause them to honor his contract and cease interfering with his business.

It did the very opposite. NAVL and Molloy joined together even more so to put Ferguson Transportation out of business entirely. Not only did they continue for another two years to tortiously interfere with Ferguson Transportation's business in Broward County, thus reducing its revenue from interstate, intrastate and local moves, but NAVL also began cutting Ferguson Transportation's Intermodel express (IMX) business, its backhaul business, its high value products (HVP) business and its storage-in-transit (SIT) business, thus reducing Ferguson Transportation's revenue even more (R318,357-59,369-75). Ferguson was finally forced to even stop taking a salary in a desperate attempt to

help Ferguson Transportation's cash flow situation (R959). However, because of Ferguson Transportation's increased expenses as a result of its expansion based upon NAVL's assurances that its exclusive territory was protected and would not be invaded, Ferguson Transportation was not able to withstand the loss of income.

Throughout 1987 and 1988, even though NAVL was aware that Molloy was stealing Ferguson Transportation's business by improperly advertising and soliciting in Broward County, NAVL joined in this tortious interference by authorizing and scheduling the moves in interstate commerce, providing the documentation for and ICC authorization for, participating in the interstate moves, and sharing in the monies generated by such moves. It also continued to participate in Advance Relocation's solicitation of business by providing it with NAVL's sales brochures, etc.

1989

Ferguson was forced to put Ferguson Transportation up for sale because NAVL and Advance Relocation's tortious interference had made it impossible for the company to continue to meet its financial obligations (R375). Their wrongful acts literally drove Ferguson Transportation out of business (R605-06). While Ferguson was negotiating to sell the company to a buyer who was considering running it as an NAVL agency, in August 1989 NAVL stopped accepting any of Ferguson Transportation's shipments (R552), and on September 5, 1989, NAVL terminated its agency contract (R375). This resulted in Ferguson being forced to sell the company on September 12, 1989 for no

profit (R375,556). The buyer took over all the buildings and mortgages, a $500,000 line of credit and payments on the leased equipment (R375-76). Ferguson walked away with no cash and several hundred thousand dollars in liabilities (R376).

During 1989, NAVL continued to tortiously interfere with Ferguson Transportation's Broward County business by authorizing, scheduling, participating in and sharing the monetary benefit of the interstate moves scheduled by Advance Relocation.

B) NAVL's Tortious Interference

Even though NAVL claimed that Molloy had orally agreed not to advertise in Broward County (which he denied), in fact he began advertising and soliciting in Broward County in January 1986. Without question, NAVL was informed that Advance Relocation's moves from Broward County were as a result of its improper advertising and soliciting. Over the next four years NAVL only took action intended to make it appear as if it was protecting Ferguson Transportation: it had Molloy disconnect his Broward County telephone number for five months in 1986, and it wrote advertisers in 1987 and told them not to allow Molloy to advertise as its agent. These minimal actions did not excuse NAVL's clear tortious interference in the following respects:

1) NAVL was in total control of whether Ferguson Transportation's exclusive contract was interfered with by Advance Relocation, and NAVL aided and abetted that tortious interference. NAVL's dispatcher accepted and scheduled every move when contacted by Advance Relocation to schedule moves from Broward County. These moves

were pre-approved and pre-arranged by NAVL. They were participated in by NAVL because it provided all the documentation, including sales brochures, used in the moves, which were performed under NAVL's ICC bills of lading and ICC registration number. Advance Relocation could not have stolen a single Broward County interstate customer from Ferguson Transportation unless NAVL agreed to participate in the moves by allowing them to occur under its ICC registration number. All NAVL had to do to protect Ferguson Transportation was refuse to schedule Advance Relocation's moves out of Broward County and refuse to allow them to be made under NAVL's ICC registration number. Instead, even though NAVL knew what Advance Relocation was doing was wrong, NAVL chose to participate in the tortious interference nonetheless because it meant money in its pocket. As McTeague admitted, "profitability" was what NAVL was all about (R2608). NAVL had the monies collected on the moves made payable to NAVL (PX62-64). It then remitted the agent's portion of the money collected on each move to Advance Relocation (R371,486,488-89) when it knew that those monies belonged to Ferguson Transportation, its exclusive Broward County agent, and kept the balance.

2) NAVL was also vicariously liable for the acts of tortious interference by its agent, Advance Relocation. The evidence is clear that Advance Relocation tortiously interfered with Ferguson Transportation's advantageous business relationship. The jury so found and the Fourth District affirmed that finding. Since Advance Relocation was acting as NAVL's agent, NAVL was vicariously liable for Advance Relocation's direct interference by soliciting and advertising for business in Ferguson Transportation's

exclusive territory. The jury was fully instructed on agency, scope of authority, and ratification issues, and none of those instructions were challenged by NAVL (R1625-30).

Ferguson Transportation's Damages as a Result of the Tortious Interference

A) Loss of Income

For the first four years of this litigation, NAVL refused to produce bills of lading of the Broward County moves it had participated in with Advance Relocation. Six months before trial it produced incomplete bills of lading for 1986 and 1987 (R321,361,365,597), but no bills of lading at all for 1988 or 1989 (R283-84,319). According to Ferguson, the documents produced indicated that Ferguson Transportation had been deprived of millions of dollars in gross revenue from Broward County (R365), which equated to at least a net income of $300,000. Because of NAVL's refusal to produce all its bills of lading, Ferguson had no way of knowing the total income Ferguson Transportation had lost as a result of Defendants' tortious interference.

The bills of lading that were produced were placed into evidence at trial. They showed moves by Advance Relocation for Broward County customers under NAVL's ICC bills of lading (PX62-64). They identified each customer, their address, the date of the move, the state moved to, etc. The bills of lading represented moves that Advance Relocation could not have performed on its own because it was not an authorized ICC carrier. Ferguson testified that 99% of the moves represented by the bills of lading had

gone to Advance Relocation as the result of the tortious interference of NAVL and Advance Relocation (R518,520-21).

In addition to its loss of income from interstate moves, Ferguson Transportation also lost intrastate and local moves to Advance Relocation as a result of the tortious interference. It also lost income because NAVL cut its Intermodel Express IMX business, its high value products (HVP) business, and its storage-in-transit (SIT) business (R318,357-59,369-75). NAVL's dispatcher also cut Ferguson Transportation's backhauls (R369). "Backhauling" occurs when a mover is given a shipment on the return haul by NAVL's dispatch office in Ft. Wayne, Indiana (R369-70). It is very expensive to handle interstate moves when the moving vans make empty return trips (R564). Backhauling represented important cash flow for Ferguson Transportation's business (R369). Ferguson was forced to go to his friends, agents and business contacts that he had developed over 26 years to try to acquire shipments for his vans on the backhaul (R370). Backhauls were available, but NAVL lied to Ferguson and told him there were none. Ferguson established this fact by having a Gainesville agent call NAVL's dispatcher and he was given backhauls in the same areas Ferguson had been told none existed (R373-74,564). The loss of backhauls caused Ferguson Transportation to lose seven drivers (R369,374-75) because they make more money hauling both ways.

Ferguson testified that the loss of income at a critical time in the company's growth, and while undergoing a major capital expansion, had been devastating to Ferguson Transportation (R366).

B) Loss In Value of the Business

When Defendants drove Ferguson Transportation out of business, Ferguson was forced to sell the company for zero. The loss in value of the business was 1.5 to 1.8 million dollars (R378-384), which figure represented the hard assets and no goodwill.

CERTIFIED QUESTION

WHETHER, UNDER FLORIDA LAW, A PLAINTIFF WHO HAS AN EXCLUSIVE CONTRACT WITHIN A GEOGRAPHICAL TERRITORY, IS AFFORDED A BUSINESS RELATIONSHIP WITH ALL PROSPECTIVE CUSTOMERS WITHIN THAT TERRITORY, WHICH IS PROTECTABLE AGAINST TORTIOUS INTERFERENCE, OR MUST THE PLAINTIFF PROVE A BUSINESS RELATIONSHIP WITH IDENTIFIABLE CUSTOMERS?

SUMMARY OF ARGUMENT

The certified question should be answered as follows: An exclusive contract within a geographical territory provides a protectable business relationship with all prospective customers within that territory, and the plaintiff does not have to prove an ongoing business relationship with identifiable customers. Ferguson's testimony demonstrated that but for NAVL's interference, 99% of the Broward County customers who sought an NAVL agent and who hired Advance Relocation, with NAVL's collaboration and assistance, would have hired Ferguson Transportation. Alternatively, Ferguson did prove a business relationship with identifiable customers even though not required to do so.

Accordingly, the jury's compensatory and punitive damage awards in Ferguson Transportation's favor should be reinstated.

ARGUMENT

THE SECOND PART OF THE CERTIFIED QUESTION SHOULD BE ANSWERED "NO":

A) Proof of Tortious Interference Does Not Require Proof of An Ongoing Business Relationship With Identifiable Customers.

The customers which Ferguson Transportation lost to Advance Relocation as a result of Defendants' tortious interference were identifiable. In fact, they were identified. Ferguson Transportation placed into evidence NAVL's bills of lading reflecting moves from Broward County by Advance Relocation. These bills of lading contained the customers' names, etc. So, without question, the stolen customers were "identifiable".

The problem is that the Fourth District ruled that Ferguson Transportation had to prove that it had an "ongoing relationship" with these identifiable customers. While the Fourth District acknowledged that it was well established under Florida law that the business relationships interfered with can be with prospective customers, it ruled that under SOUTHERN ALLIANCE CORPORATION v. WINTER HAVEN, 505 So.2d 489 (Fla. 2d DCA 1987) the "business relationship must be with an identifiable person and not with the public at large." The Court reasoned that Ferguson Transportation's exclusive agency agreement, which gave it the exclusive right to act as NAVL's agent in

Broward County, did not obviate the need for it to prove interference with "ongoing business relationships" (A7) with identifiable past or prospective customers (A6).

By requiring proof of an ongoing business relationship with identifiable customers, the Fourth District has ignored the fact that the required "business relationship" can be either an existing business relation or an expectancy, and that the business relation can be either existing or prospective. As 45 Am.Jur2d Interference §50 provides:

> §50. **Interference with business relationship.**
>
> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; and intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of this tort who interferes with business relations of another, both existing and prospective....
>
> The tort action for interference with business relations which are prospective or potential developed at an early date, in cases having to do with physical violence or threats thereof to drive away customers from the plaintiff's market. For this tort to occur, the business relationship, if in existence, need not be cemented by written or verbal contract and, whether or not it is in existence, it need not be intended that there be a contract. The interest protected is the reasonable expectation of economic advantage.
>
> In naming the tort for interference with a businessman's prospective economic gain, the texts and cases use different terms. The American Law Institute uses the term 'inducing refusal to deal,' and this term is used by the courts of some states. Some courts distinguish the tort of 'interference with prospective economic advantage' and the

> similar tort of 'interference with contractual or business relations,' using the former term where there is no existing business relationship. (Emphasis added).

In accord with §50, supra, Florida courts recognize that the "business relationship" referred to in tortious interference cases encompasses not only existing business relations, but also expectancies. See SMITH v. OCEAN STATE PARK, 335 So.2d 641, 643 (Fla. 1st DCA 1976), which quotes §50, supra.

No Florida case imposes the requirement that the interference be with an "ongoing" business relationship with an "identifiable customer."[12] The required "business relationship" encompasses both existing and/or prospective customers. MERLITE LAND v. PALM BEACH INV. INC., 426 F.2d 495 (5th Cir. Fla. 1970); DOFT & CO., INC. v. HOME FED. S&L ASS'N., 592 F.2d 1361 (5th Cir. Fla. 1979); SMITH v. OCEAN STATE BANK, supra; REGISTER v. PIERCE, 530 So.2d 990 (Fla. 1st DCA 1988), rev. den. 537 So.2d 569. "Prospective" means "anticipated or expected in the future." Funk & Wagnall's New Comprehensive International Dictionary of the English Language. Since prospective customers are not existing customers, there necessarily is no "ongoing" relationship with them, which the Fourth District has now held is required in a tortious interference with business relationship case. The result of the Fourth District's holding is that it does away with tortious interference with

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[12]/KNAPP v. McCOY, 548 F.Supp. 1115 (N.D. Ill. 1982) held that proof of an "identifiable general class of customers" (radio stations) is sufficient. Broward County customers seeking to move with NAVL's authorized Broward County agent is a sufficient identifiable general class of customers.

prospective customers. This was recognized by the trial court below in denying NAVL's argument that identifiable business relationships must be proven (T853):

> THE COURT: I didn't really understand that argument. It seems that prospective business can be interfered with....

B) SOUTHERN ALLIANCE CORP. v. CITY OF WINTER HAVEN Did Not Involve an Exclusive contract, and Therefore It Is Totally Inapplicable.

The sole case upon which the Fourth District relied, SOUTHERN ALLIANCE CORP. v. CITY OF WINTER HAVEN, 505 So.2d 489 (Fla. 2d DCA 1987), involved no exclusive agreement, and therefore it afforded the lounge owner no protectable legal right to customers in the community, In that case, city employees, in enforcing fire prevention and life safety codes, closed a lounge. The lounge owner sued the City for, inter alia, tortious interference with business relationships. It alleged that prior to the lounge being closed, it had established and enjoyed an ongoing, advantageous business relationship with the community. It did not, and could not, allege any legal right or entitlement to its lounge customers, or a business or property interest in its business relationship with those customers. For that reason, the Second District affirmed the dismissal of the tortious interference count because:

> ...Southern failed to plead the existence of a business relationship under which it has legal rights.

505 So.2d at 496. The Court concluded that it found no case establishing a cause of action for tortious interference with a business relationship with the community at large.

SOUTHERN ALLIANCE is totally different from a case involving an "exclusive agency agreement", as here.[13] The exclusive agreement creates a business relationship with prospective customers within its geographic territory, and creates a legal right as to those customers which is a protectable property right. Accordingly, proof of an exclusive agreement itself proves the first element of tortious interference, i.e., a business relationship or expectancy under which the plaintiff has legal rights.

C) In Any Event, the Fourth District Ignored Ferguson's Testimony That But For NAVL and Advance Relocation's Tortious Interference, 99% of the Customers Who Moved with Advance Relocation Would Have Moved with Ferguson Transportation

The Fourth District incorrectly found that Ferguson Transportation failed to present evidence that but for NAVL and Advance Relocation's tortious interference the customers who moved with Advance Relocation would have moved with Ferguson Transportation (A6). The evidence showed that Ferguson had been operating in Broward County as NAVL's exclusive agent for 16 years. Ferguson had built up a tremendous business for NAVL in Broward County. Advance Relocation had no connection or history or ties to Broward County. Ferguson testified that 99% of the business that had gone to Advance Relocation had gone to it because of the improper yellow pages advertisements by

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[13]/This Court is considering whether SOUTHERN ALLIANCE requires proof of identifiable business relationship in a certified question by the Eleventh Circuit in GEORGETOWN MANOR, INC. v. ETHAN ALLEN, INC., 991 F.2d 1533 (11th Cir. 1993).

Advance Relocation and NAVL in Broward County, and because of the improper solicitations in Broward County by Advance Relocation and NAVL (R518,520-21). Neither Advance Relocation nor NAVL rebutted Ferguson's testimony. They did not produce one witness, or any other evidence, to show that the customers Advance Relocation moved from Broward County were customers who came to Advance Relocation because they were seeking out Advance Relocation, rather than Ferguson Transportation, NAVL's only authorized Broward County agent. There was at least a jury issue presented as to whether the Broward County customers that Advance Relocation moved would have patronized Ferguson but for the tortious interference of Advance Relocation and NAVL.

In fact, counsel for NAVL admitted to the trial court that Ferguson's testimony created a jury question. During the charge conference, counsel for the parties were discussing the rewording of Defendants' proposed jury instruction number 10, and agreed upon the following language (R1364-67):

> If the business was acquired by some means other than by representing Advance to be an agent of North American Van Lines in Broward County, then such act is not a tortious interference. But if the business was acquired by representing Advance to be a North American Van Lines agent in Broward County, such act is a tortious interference. (R1622-23) (Emphasis added).

Counsel for NAVL admitted that a question of fact was created by Ferguson's testimony as to whether all the business Advance Relocation had acquired from Broward County was a result of tortious interference (R1365):

> MR. MURPHY: Your honor, Mr. Ferguson testified that there was at least one percent of the customers that could possibly have gone to Advance for reasons other than the yellow page advertising, and so I, therefore, think it is a jury issue as to whether or not that exclusivity relates to every single customer, based upon his testimony, and I think that it is a jury question in that regard. (Emphasis added).

When counsel for Ferguson Transportation later argued that, in addition to Ferguson's testimony, the exclusive contract itself created an advantageous business relationship with Broward County consumers, counsel for NAVL retorted (R1369):

> MR. MURPHY: Other than what Mr. Ferguson testified to, that one percent, which we ought to be able to argue.

And later counsel for NAVL again referred to (R1408):

> ...that one percent which Mr. Ferguson admits could have been outside of his exclusivity or produced by Advance other than the yellow page ad or soliciting.

Under the above agreed-upon jury instruction, the jury obviously found that NAVL interfered with Ferguson Transportation's business relations with Broward County consumers by inducing or otherwise causing them to schedule moves with Advance Relocation by representing the latter to be NAVL's exclusive agent in Broward County. The jury also obviously found that but for NAVL and Advance Relocation's interference, the customers who moved with Advance Relocation would have been Ferguson Transportation's customers. The Fourth District ignored the jury's finding and substituted its own finding in that regard. For that reason alone, the Fourth District's decision should be reversed.

THE FIRST PART OF THE CERTIFIED QUESTION SHOULD BE ANSWERED "YES":

A) An Exclusive Contract Creates a Business Relationship or Expectancy With Prospective Customers Within its Geographic Territory and Constitutes a Property Right Protectable By An Action for Tortious Interference.

Ferguson's exclusive agency agreement with NAVL for Broward County was sufficient proof in and of itself of a business relationship or expectancy with all prospective Broward County customers who decided to move with NAVL. Ferguson did not have to go further and prove ongoing business relationships with identifiable customers. The exclusive agreement created more than a bare expectancy that the prospective customers were Ferguson's. It created a legal right or entitlement to all Broward County NAVL customers. Accordingly, proof of Ferguson's exclusive agency in Broward County was sufficient proof of its legal right to move all prospective customers who sought to book moves with an NAVL agent in Broward County.

The issue was addressed in AMERICAN SANITARY SERVICE, INC. v. WALKER, 554 P.2d 1010 (Or. 1976). The plaintiff had an exclusive franchise with the county to provide waste disposal services for the unincorporated area surrounding the city. A third party began serving plaintiff's franchised area. Plaintiff obtained an injunction preventing interference with his franchise. The plaintiff subsequently obtained damages for tortious interference which the trial court set aside, and the plaintiff appealed. The Oregon Supreme Court ordered the jury's verdict reinstated. The court rejected the defendant's contention that the plaintiff had to plead and prove a contractual

or business relationship with its customers or prospective customers in its exclusive territory. The court stated:

> Although admitting that plaintiff's exclusive franchise agreement with Clackamas County "may create a contractual or property right of some nature," defendant argues that plaintiff must fail since it "did not plead a contractual relationship with any of its customers or potential customers in the territory involved."

The court ruled that a business relationship with the plaintiff's customers or potential customers was created by its exclusive franchise agreement, which gave rise to an interest protectable against tortious interference.

The rationale in WALKER makes sense. Generally competition for, and solicitation of, business from a party who has a non-exclusive contract does not constitute tortious interference with a business relationship.[14] INTERNATIONAL EXPOSITIONS, INC. v. CITY OF MIAMI BEACH, 274 So.2d 29 (Fla. 3d DCA 1973); KENNAMETAL v. SUBTERRANEAN EQUIPMENT CO., 543 F.Supp. 437 (W.D. Pa. 1982). However, that is not true where the competition or solicitation is unjustified. If a party is aware that another party has an exclusive contract, and he nonetheless invades that territory, the competition is unjustified and he can be held liable for tortious interference. That is because the exclusive contract gives the party thereto the exclusive opportunity to obtain prospective customers within its territory. And, expectancies of

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[14]/However, a 20-year non-exclusive business relationship has been held to create a "protectable business expectancy". CONOCO, INC. v. INMAN OIL CO., INC., 774 F.2d 895 (8th Cir. 1985).

future contractual relations such as the opportunity of obtaining customers is one of the expectancies protected by a tort action for interference with advantageous business relationships. W. Prosser, LAW OF TORTS §130 at 950 (4th Ed. 1971); NORTH v. STATE, 400 N.W.2d 566, 569 (Iowa 1987) and cases cited therein. See also SCHUBOT v. McDONALDS CORP., 757 F.Supp. 1351 (S.D. Fla. 1990), aff'd. 963 F.2d 385, where the court affirmed a summary judgment on a tortious interference count because:

> ...plaintiffs have no legal right to any new McDonald's franchise to be awarded in Palm Beach County. In the absence of a legal enforceable right to the creation of such a future business relationship, the elements of this tort are simply absent.

In this case, like WALKER, and unlike SCHUBOT, Ferguson Transportation's exclusive agency agreement gave it a legally enforceable right to future NAVL business in Broward County.

B) Both Third Parties and the Party Granting the Exclusive Contract Can Be Held Liable for Tortiously Interfering With the Other Party to the Contract's Advantageous Business Relationship With Customers and Prospective Customers Within the Exclusive Territory.

A third party's interference was involved in WALKER, supra. See also MANNION v. STALLINGS & CO., INC., 561 N.E.2d 1134 (Ill. App. 1990). As demonstrated herein, the party granting the exclusive contract can also be liable for tortious interference with customers and prospective customers within the exclusive territory. The party granting an exclusive contract is not immune from liability for

tortious interference when he directly interferes with business relationships created with existing and/or potential customers by the exclusive contract.

In ACTION ORTHOPEDICS v. TECHMEDICA, INC., 759 F.Supp. 1566 (M.D. Fla. 1991), Action Orthopedics entered into a five-year contract as the exclusive distributor of Techmedica's products in an particular area. Action subsequently sued Techmedica for both breach of contract and tortious interference with business relationships. The court rejected Techmedica's contention that its conduct must be viewed as arising under the contract and resolved by contract law. The court held that the distributor could sue for both breach of contract and tortious interference.

In NORDYNE v. FLORIDA MOBILE HOME SUPPLY, 625 So.2d 1283 (Fla. 1st DCA 1993), a distributor recovered from a manufacturer on claims of fraud and intentional interference with business relationships based upon the manufacturer's refusal to permit the distributor to continue to distribute its product.

GNB, INC. v. UNITED DANCO BATTERIES, INC., 627 so.2d 492 (Fla. 2d DCA 1993), affirmed a $1,025,000 award for tortious interference with advantageous business relationships in favor of a wholesaler against a manufacturer, even though they were parties to a contract, and the jury also awarded the wholesaler $100,000 on its breach of contract claim.

In WESTERN FIREPROOFING COMPANY v. W.R. GRACE & CO., 896 F.2d 286 (8th Cir. 1990), Western Fireproofing, a roofing product application licensee, brought an action against the licensor, W.R. Grace & Co., for fraud and tortious

interference, claiming that the latter had promised that if it signed a license agreement to sell the licensor's roofing product, it would be given an exclusive territory. The licensee alleged that the licensor had tortiously interfered with the licensee's business expectancies by licensing a competing roofing product applicator within the licensee's exclusive territory, and by assisting the competitor through improper tactics in obtaining the licensee's customers. According to the licensee, the licensor had assisted its competitor in persuading customers and others to transfer their roofing business to the competitor. While the licensor denied having agreed that the licensee could have an exclusive territory, the jury found against him, and therefore it rejected that contention.

The trial court rejected the licensor's contention that the licensee had not demonstrated a valid business expectancy and that it had failed to prove tortious interference. The court stated that the licensee's claim was that the licensor had done much more than merely appoint another competitor. It had also joined with the competitor and assisted him to move business away from the licensee. The basis of the licensee's tortious interference theory was that this action essentially drove the licensee out of business. The Eighth Circuit ruled that the question of the licensor's tortious interference, and the extent to which the licensor's activity with the competitor had damaged the licensee's business, was properly submitted to the jury:

> The basis of that theory [tortious interference] is Western's claims that Grace and its new applicator essentially drove Western out of the Zonolite business through unfair tactics....

> Grace argues, essentially, that because it had the right to appoint a competing Zonolite applicator and to reap the potential economic benefits, Grace's action was justified as a matter of law. Once again, Grace ignores Western's claim that Grace did much more than merely appoint a Zonolite competitor. Western claimed Grace provided preferential pricing and unfairly lobbied past customers to move their business away from Western. We find no justification as a matter of law for Grace's challenged conduct, and the jury apparently credited Western's version of these events....

While the improper tactics used here differ from those used in WESTERN FIREPROOFING, the bottom line is that here, NAVL joined Advance Relocation in the tortious interference with Ferguson Transportation's Broward County customers.

1) The Issue Is Direct Interference v. Incidental Interference

Even where a non-exclusive contract is involved, cases throughout the country make a party to a contract not only liable for breach of the contract, but also liable for tortious interference with advantageous business relationships created under the contract. Interference with advantageous business relationships is a separate and independent tort. HALES v. ASHLAND OIL, INC., 342 So.2d 984 (Fla. 3d DCA 1977), cert. den. 359 So.2d 1214 (Fla. 1978). That is because the contract and the business relationships created under the contract are separate and distinct. The party breaching the contract is not a party to the advantageous business relationships created under the contract. SCHELLER v. AMI, 502 So.2d 1268, 1272 (Fla. 4th DCA 1987); FASCO INDS. v. ARONBRUSTER PRODUCTS, 19 Fla. L. Weekly D1537, 1538, (Fla. 4th DCA July 20, 1994), Judge Warner's concurring opinion.

Interference with an advantageous business relationship amounts to more than a breach of contract, and thus constitutes a separate and independent tort, where the interference is the result of more than an incidental or indirect consequence of the breach of contract. The seminal case holding that incidental interference resulting from the mere breach of contract is not actionable as such is GLAZER v. CHANDLER, 200 A.2d 416 (Penn. S.Ct. 1964) [where...the allegation and evidence only disclose that defendant breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches...]. See also DiCESARE-ENGLER PRODS., INC. v. MAINMAN, LTD., 81 FRD 703 (W.D. Penn. 1979) [recognizing rule that a cause of action for tortious interference does not lie for incidental interference arising from a breach of contract]; CHERBORG v. PEOPLES NAT'L BANK OF WASHINGTON, 564 P.2d 1137,1143 (Wash. 1977) en banc [if the incidental consequence of a breach of a duty under a contract necessarily interferes with the injured party's business relations with third parties, the injured party is limited to an action for breach of contract and may not recover in tort for business interference]. MELLON BANK v. AETNA BUSINESS CREDIT, INC., 500 F.Supp 1312, 1322 (W. Pa. 1980) [a mere breach of contract which

has the effect of damaging the plaintiff's business relations with others does not support the tort of intentional interference].[15]

A number of out-of-state cases have found that direct interference with the plaintiff's business relations constitutes a separate and independent tort and not an incidental effect of the defendant's breach of contract. In GEORGE A. DAVIS, INC. v. CAMP TRAILS CO., 447 F.Supp. 1304 (E.D. Penn. 1978), an action was brought by a distributor against its supplier and the supplier's parent corporation for interfering with the distributor's existing and prospective business relationships by terminating the relationship between the distributor and supplier. The Court held that an action for tortious interference was stated, and that GLAZER v. CHANDLER, supra, which prohibits a tortious interference case where the breach of contract only incidentally affects the plaintiff's business relationships, was inapplicable under the facts of that case..

In BOLZ v. MYERS, 651 P.2d 606 (Mont. 1982), Bolz purchased a business under a contract containing a noncompete clause. After the sale closed, Mason Myers informed Bolz that he intended to continue in business in competition. The court held that Myers was liable for both breach of contract and tortious interference because he went beyond the breach of his own contract by interfering with the buyer's customers:

> The distinction to be made here on the facts as found by the court is that Mason breached his contract with Bolz;

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[15]/The requirement of direct, rather than incidental, interference in order to prove tortious interference is the very reason the Fourth District's conclusion that every breach of an exclusive agency agreement would also be tortious interference is wrong.

> but he also went further and intentionally interfered with Bolz's business relationships with third parties, who were Bolz's customers or potential customers.
>
> The outrageous acts of Mason Myers are improper, considering all such factors. In addition to breaching his contract to sell the business of KHAC, he went far out of his way during and after the transfer of the business to destroy Bolz's business relationships with customers....Thus on the facts in this case, it is established that Mason Myers not only breached his contract with Bolz, but Mason went further and intentionally interfered with Bolz's contractual or business relationships with third parties.

As in BOLZ, here NAVL's actions went much further than a mere breach of contract. NAVL's passive failure to protect Ferguson Transportation's exclusive territory might be viewed as only a breach of its contract duties, but the direct and active involvement of NAVL in assisting a competitor to masquerade as its authorized agent in Broward County and the direct, essential and intimate involvement of NAVL at every subsequent stage of servicing the stolen customers is a separate and independent tort. NAVL engaged in these acts for 3 years and nine months that helped destroy Ferguson Transportation.

Florida case law follows the GLAZER direct vs. incidental distinction. ETHYL CORP. v. BALTER, 386 So.2d 1220, 1224 (Fla. App. 1980), cert. den. 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981) ["There is no such thing as a cause of action for interference which is only negligently or consequentially effected"]; HALES v. ASHLAND OIL CO., supra, [contract purchasers of trawlers held to have at best been indirectly affected by breach of manufacturer of contract to supply hulls to boat builder; GRIESE-TRAYLOR CORP. v. FIRST NATIONAL BANK OF BIRMINGHAM, 572

F.2d 1039 (5th Cir. 1978) [interpreting Florida law - a defendant who merely refuses to carry out an agreement with a plaintiff cannot be held liable for interference with the plaintiff's business relations with a third party, where such interference was only indirect and incidental]; LAWLER v. EUGENE WUESTHOFF MEMORIAL HOSPITAL, 497 So.2d 1261 (Fla. 5th DCA 1986) [radiologist alleged that the hospital, its trustees and its attorney wrongfully breached his contract with the hospital by terminating his staff privileges]. The court held that he could not recover for tortious interference with business relationships with his patients and other doctors in the community since:

> [t]he complaint failed to allege direct interference by the appellees with the doctor/patient, doctor/doctor relationship. Clearly the alleged interference with these relationships was only an indirect consequence of the termination of Dr. Lawler's staff privileges. Cf., 4 Restatement (2d) of Torts §766C (1979)]. (Emphasis added).

See also SCHELLER v. AMI, 502 So.2d 1268, 1272 (Fla. 4th DCA 1987) and AMI v. SCHELLER, 590 So.2d 947 (Fla. 4th DCA 1991), where Dr. Scheller was allowed to recover damages for tortious interference against a hospital even though he had a contract (bylaws) with the hospital.

2) NAVL Was Liable for Tortious Interference Where It Directly Participated in Advance Relocation's Moves From Broward County

As in LAWLER, here it cannot reasonably be argued that NAVL's interference with Ferguson Transportation's business relationships with its prospective customers was only an indirect consequence of NAVL's breach of contract by appointing Advance

Relocation to act as its agent. Rather, it is undisputed that NAVL's interference was direct. NAVL participated in each Broward County move performed by Advance Relocation by pre-approving the move, providing the documentation for the moves, authorizing the moves to be performed under its ICC bill of lading and ICC registration number, having the monies collected on the moves made payable to NAVL, retaining a portion of those monies and remitting the agent's portion to Advance Relocation, when NAVL knew it belonged to Ferguson Transportation. It also facilitated Advance Relocation's solicitation of Broward County business by providing it with NAVL's sales brochures. These acts constitute direct interference with these customers, and therefore NAVL was liable for tortious interference under the above-cited cases, such as ACTION ORTHOPEDICS v. TECHMEDICA, INC., NORDYNE v. FLORIDA MOBILE HOME SUPPLY, and GNB, INC. v. UNITED DANCO BATTERIES, INC., supra.

AFS v. LEWIS, 519 So.2d 26 (Fla. 5th DCA 1987), is also applicable. AFS, the national service agent of an insurer, was to remit fees and commissions on policies sold by an insurance agent (Hewitt), who split his fee with his employer (AGRA). His employer (AGRA) and the service agent (AFS) got together and decided to deal directly without paying the insurance agent (Hewitt). AFS remitted to AGRA the fees and commissions which otherwise would have been paid to Hewitt. The Fifth District affirmed the jury's finding that in doing so AFS had tortiously interfered with Hewitt's business relationships. As in AFS v. LEWIS, supra, here Advance Relocation collected the money from the customers and sent it to NAVL, who then sent back to Advance

Relocation the portion that should have gone to Ferguson Transportation. Under AFS v. LEWIS, that was direct interference by NAVL.

Three years and nine months of direct interference almost by definition constitutes more than a mere breach of contract. The three-year and nine-month period is important. As stated in LEIGH FURNITURE & CARPET v. ISOM, 657 P.2d 315 (Utah 1982):

> Taken in isolation, each of the foregoing interferences with Isom's business might be justified as an overly zealous attempt to protect the Corporation's interest under its contract for sale. As such, none would establish the intentional interference element of this tort, though some might give rise to a cause of action for breach of specific provisions in the contract or of the duty of good faith performance which inheres in every contractual relation. Even in small groups, these acts might be explained as merely instances of aggressive or abrasive -- though not illegal or tortious -- tactics, excesses that occur in contractual and commercial relationships. But in total and in cumulative effect, as a course of action extending over a period of three and one-half years and culminating in the failure of Isom's business, the Leigh Corporation's acts cross the threshold beyond what is incidental and justifiable to what is tortious. (Emphasis added).

As in LEIGH FURNITURE, here NAVL's three years and nine months of interference went well beyond incidental interference to become direct interference.

3) NAVL Was Also Liable for Tortious Interference Because It Was Vicariously Liable for the Acts of Its Agent, Advance Relocation

The household moving industry is heavily regulated by the federal government. This is because ICC carriers would historically hire local carriers to operate under their

ICC authority and display their name, trademark, and ICC registration and then claim the agent was an independent contractor and the carrier was not responsible for its acts. Many times the local carriers were using unsafe equipment and impaired drivers. The federal government finally decided that if licensed ICC carriers were going to use non-ICC licensed local movers to act as their agents, they were going to be responsible for their acts. Accordingly, 49 U.S.C. §10934 provides:

> **§10934. Household goods agents**
>
> (a) Each motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title shall be responsible for all acts or omissions of any of its agents which relate to the performance of household goods transportation services (including accessorial or terminal services) subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and which are within the actual or apparent authority of the agent from the carrier or which are ratified by the carrier.[16]

In this case, the jury was given extensive instructions on agency, scope of authority, and ratification of an agent's acts (R1625-30). The jury obviously found that Advance Relocation was operating as NAVL's agent in soliciting Ferguson Transportation's business, or its acts were ratified by NAVL (by scheduling the moves under its ICC authority and accepting money from the moves, etc.). Therefore, in addition to its own direct acts of tortious interference, NAVL was vicariously liable for

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[16]/Subchapter II of Chapter 105 of Title 49 applies to both transportation in interstate commerce and the "procurement of that transportation". 49 U.S.C. §10521.

the tortious interference of Advance Relocation. The fact that a principal is vicariously liable for its agents' direct acts does not convert those direct acts to indirect acts of interference. DANIELS v. DEAN, 833 P.2d 1078 (Mont. 1992).

CONCLUSION

The Fourth District incorrectly ruled that Ferguson Transportation failed to prove a cause of action for tortious interference against NAVL. Ferguson Transportation's exclusive agency agreement with NAVL for Broward County afforded it a business relationship with all prospective customers within that territory. Accordingly, Ferguson Transportation did not have to prove an ongoing business relationship with identifiable customers. In fact, however, Ferguson's testimony established that but for NAVL's tortious interference the Broward County customers who hired Advance Relocation would have hired Ferguson Transportation. Accordingly, the jury's compensatory and punitive damage awards in favor of Ferguson Transportation should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 9th day of SEPTEMBER, 1994, to: MARK E. HADDAD, ESQ., 1722 Eye Street, N.W. Washington, D.C. 20006; and MARJORIE GRAHAM, ESQ., Northbridge Centre, Suite 1704, 515 North Flagler Drive, West Palm Beach, FL 33401.

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P/NAVL/SCT/BRF/pss

Appendix

JUL 07 1994

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

NORTH AMERICAN VAN LINES, INC., a foreign corporation,

Appellant,

v.

FERGUSON TRANSPORTATION, INC., f/k/a MURRAY VAN & STORAGE, INC., and AWARD WINNING MURRAY VAN AND STORAGE, INC.; ADVANCE RELOCATION & STORAGE OF FLORIDA, INC., a Florida corporation; T. JAMES MOLLOY and WILLIAM GROCHOWSKI,

Appellees.

CASE NO. 92-1842.

L.T. CASE NO. CL 87-7567-AN.

Opinion filed July 6, 1994

Appeal from the Circuit Court for Palm Beach County; Edward H. Fine, Judge.

Mark E. Haddad of Sidley & Austin, Washington, D.C., and Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., West Palm Beach, for appellant.

Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, and Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for Appellee-Ferguson Transportation, Inc.

ON MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION

PER CURIAM.

ORDERED that appellees' timely motion for rehearing and rehearing en banc is hereby denied; further,

ORDERED that appellees' timely motion for certification is granted, and the following question of great public importance is certified to the Florida Supreme Court:

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WHETHER, UNDER FLORIDA LAW, A PLAINTIFF WHO HAS AN EXCLUSIVE CONTRACT WITHIN A GEOGRAPHICAL TERRITORY, IS AFFORDED A BUSINESS RELATIONSHIP WITH ALL PROSPECTIVE CUSTOMERS WITHIN THAT TERRITORY, WHICH IS PROTECTIBLE AGAINST TORTIOUS INTERFERENCE, OR MUST THE PLAINTIFF PROVE A BUSINESS RELATIONSHIP WITH IDENTIFIABLE CUSTOMERS?

GUNTHER, STONE, JJ., and RAMIREZ, JUAN, JR., Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

NORTH AMERICAN VAN LINES, INC., a foreign corporation,

Appellant,

v.

FERGUSON TRANSPORTATION, INC., f/k/a MURRAY VAN & STORAGE, INC., and AWARD WINNING MURRAY VAN AND STORAGE, INC.; ADVANCE RELOCATION & STORAGE OF FLORIDA, INC., a Florida corporation; T. JAMES MOLLOY and WILLIAM GROCHOWSKI,

Appellees.

CASE NO. 92-1842.

L.T. CASE NO. CL 87-7567-AN.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed March 23, 1994

Appeal from the Circuit Court for Palm Beach County; Edward H. Fine, Judge.

Mark E. Haddad of Sidley & Austin, Washington, D.C., and Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., West Palm Beach, for appellant.

Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, and Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for Appellee-Ferguson Transportation, Inc.

RAMIREZ, JUAN, JR., Associate Judge.

Appellant, North American Van Lines, Inc., appeals from an adverse judgment after a jury verdict in the amount of $1,300,000.00 in compensatory damages and $13,000,000.00 in punitive damages. We affirm the compensatory damages and reverse the punitive damages.

Ferguson Transportation, Inc. filed a two-count complaint against North American and other defendants who are not involved in this appeal. The first count alleged a breach of an exclusive agency agreement. The second count sought recovery based on tortious interference with advantageous business relationships predicated on its relationships with prospective Broward customers. North American moved for a directed verdict on the tortious interference claim, which the trial court denied.

On March 27, 1970, North American and Murray Van & Storage, Inc., n/k/a Ferguson, entered into a contract appointing Murray Van as its exclusive agent in Broward and Boca Raton. In 1983, Ferguson's predecessor renewed for ten years its exclusive agency for Broward County.

On January 1, 1986, North American granted an agency contract appointing Advance Relocation & Storage of Florida, Inc., d/b/a Wilkinson Moving and Storage, Co., to act as North American's agent in a nonexclusive capacity in West Palm Beach. Ferguson had learned that this agreement was contemplated and had objected, fearing that Advance Relocation would advertise and act as a North American agent in Broward County. The fear proved to be accurate because Advance Relocation started advertising itself in Broward the very next month.

During the following years, Advance Relocation continued its incursions into Broward County, culminating in 1989, when Ferguson was forced out of business. The jury returned a verdict on the breach of contract claim assessing $1,300,000.00 as compensatory damages. The jury also awarded the

same amount as damages on the tortious interference claim. By agreement of the parties, the trial judge struck one of the compensatory awards as duplicative.

The elements of tortious interference with a business relationship are: (1) the existence of a business relationship under which the plaintiff has legal rights; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with that relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the business relationship. Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126 (Fla. 1985). Ferguson failed to prove the first element.

The business relationship must be with an identifiable person and not with the public at large. Southern Alliance Corp. v. Winter Haven, 505 So. 2d 489 (Fla. 2d DCA 1987). That case involved a lounge owner's claim against city employees who closed down his lounge for fire code violations. The complaint had alleged an ongoing, advantageous business relationship with the community. A cause of action for interference with business relationships with prospective customers has been recognized. Zimmerman v. D.C.A. at Welleby, Inc., 505 So. 2d 1371 (Fla. 4th DCA 1987); Azar v. Lehigh Corp., 364 So. 2d 860 (Fla. 2d DCA 1978). But Southern Alliance refused to extend the cause of action for interference with a business relationship to include interference with a community at large. 505 So. 2d at 496.

In this case, Ferguson has argued that its exclusive agency agreement obviates the need to prove interference with any

identifiable customer. No authority is cited for this proposition, which would create two causes of action any time someone breaches an exclusive agency contract -- for breach of contract and for tortious interference.

At trial Ferguson was unable to bring forth a single customer who would have patronized Ferguson but for the interference by North American. Ferguson presented no one who booked a move with North American through Advance Relocation who had been a customer of Ferguson or was even a prospective customer of Ferguson.

Appellee relies on American Medical International, Inc. v. Scheller, 462 So. 2d 1 (Fla. 4th DCA 1984), rev. denied, 471 So. 2d 44 (Fla.), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985) (Scheller I) and the second Scheller case, American Medical International, Inc. v. Scheller, 590 So. 2d 947 (Fla. 4th DCA 1991), rev. dismissed, 602 So. 2d 533 (Fla. 1992) (Scheller II).

These cases do not advance appellee's position. They did not involve exclusive agency contracts. They involved interference with Dr. Scheller's contract with other physicians and patients. In Scheller I the court held that unsuccessful interference could not form the basis for damages to be assessed. 462 So. 2d at 9. In Scheller II the court held that the hospital had interfered with the contractual relationship Dr. Scheller had with the doctors that had designated him as their medical expert. 590 So. 2d at 951. Thus, Dr. Scheller could point to specific patients and physicians with whom his existing business relationship had been interfered.

Ferguson offered evidence of only one specific, identifiable business relationship with a customer who called Advance Relocation thinking it was Ferguson. The customer, however, later called Ferguson back and ultimately booked the move with Ferguson. Thus, under Scheller I, an unsuccessful interference is insufficient. 462 So. 2d at 9.

The trial court should have granted a directed verdict for North American on the tortious interference claim as there was no competent, substantial evidence that appellant interfered with any ongoing business relationship. The punitive damages were awarded on the basis of the tortious conduct and are therefore reversed.

Appellant challenges the 12 percent post-judgment interest rate imposed. Florida Statutes section 55.03(1) (1993) provides that judgments entered after October 1, 1981 shall bear interest at the rate of 12 percent per year. As appellant readily admits, the constitution "does not require immediate general adjustment on the basis of the latest market developments." Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va., 488 U.S. 336, 343, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989).

The appellant cannot raise an equal protection argument as everyone is assessed the same interest rate. Neither is due process violated because appellants are not denied their right of appeal. In fact, the U.S. Supreme Court has stated that as long as "a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a

State to provide appellate review." Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972). Any change in the rate of interest involves a policy decision best addressed by the legislature.

Appellant also challenged the trial court's admission at trial of a 1974 settlement agreement between the parties and argued that the compensatory damages were excessive. We find no merit in these arguments and affirm the jury verdict of $1,300,000.00.

REVERSED IN PART; AFFIRMED IN PART.

GUNTHER and STONE, JJ., concur.

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